

1 Richard M. Heimann (State Bar No. 63607)
2 Kelly M. Dermody (State Bar No. 171716)
3 Brendan Glackin (State Bar No. 199643)
4 Dean Harvey (State Bar No. 250298)
5 Anne B. Shaver (State Bar No. 255928)
6 LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, California 94111-3339
Telephone: 415.956.1000
Facsimile: 415.956.1008

7 Joseph R. Saveri (State Bar No. 130064)
8 James Dallal (State Bar No. 277826)
JOSEPH SAVERI LAW FIRM, INC.
9 505 Montgomery, Suite 625
San Francisco, CA 94111
Telephone: 415.500.6800
10 Facsimile: 415.395.9940

11 || *Co-Lead Class Counsel*

12 || [Additional counsel listed on signature page]

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

CLASS ACTION

**DECLARATION OF KELLY M. DERMODY
IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

1 I, Kelly M. Dermody, declare:

2 1. I am an attorney licensed to practice in the Northern District of California. I am a
 3 partner at the firm of Lieff Cabraser Heimann & Bernstein, LLP (“LCHB”), counsel for Plaintiffs
 4 Mark Fichtner, Siddharth Hariharan, and Daniel Stover, and Co-Lead Class Counsel. I have
 5 personal knowledge of the facts set forth herein and could competently testify to them if called as
 6 a witness.

7 2. I am a member in good standing of the bar of the State of California; the United
 8 States District Court for the Northern District of California; the United States District Court for
 9 the Central District of California; the United States District Court for the Eastern District of
 10 California; the United States Courts of Appeals for the First, Second, Third, Fourth, Sixth,
 11 Seventh, and Ninth Circuits; and the United States Supreme Court.

12 **Fairness, Adequacy, and Reasonableness of the Settlement**

13 3. The record in this case is well developed, including the completion of extensive
 14 fact and expert discovery, both in relation to Plaintiffs’ motions for class certification and the
 15 merits of the case; the briefing and argument of Plaintiffs’ motion and supplemental motion for
 16 class certification, and the ultimate decision by the Court to certify the class; the briefing and
 17 denial of Defendants’ motions to dismiss, individual motions for summary judgment, joint motion
 18 for summary judgment, motion to exclude testimony of Matthew Marx, and (in part) the motion
 19 to exclude testimony of Dr. Edward E. Leamer; Plaintiffs’ motion to exclude Defendants’
 20 experts’ testimony; Plaintiffs’ motion for application of the *per se* standard; and briefing on the
 21 parties’ motions *in limine* and disputes regarding the evidence to be presented at trial. In
 22 addition, at the time the Settlement was reached, the parties had completed briefing on Settling
 23 Defendants’ Petition for Writ of Mandamus, seeking an order from the Court of Appeals for the
 24 Ninth Circuit reversing the Court’s order rejecting a prior proposed settlement. (9th Cir. Case
 25 No. 14-72745, Dkt. 1.)

26 4. After the Court lifted a discovery stay in January 2012, the parties completed
 27 broad, extensive, and thorough discovery related to both class certification and the merits. The
 28 parties took 107 depositions. Plaintiffs took 93 depositions of Defendant witnesses, and served

1 75 document requests, for which Defendants collectively produced over 325,000 documents (over
 2 3.2 million pages). Plaintiffs also served 28 subpoenas on third parties, negotiated with those
 3 third parties, and received 8,809 pages of documents from them. Defendants took the depositions
 4 of Named Plaintiffs, and propounded document requests, in response to which Plaintiffs produced
 5 over 31,000 pages. Defendants also served 34 subpoenas on third parties, including the then-
 6 current and former employers of the Plaintiffs. Defendants' subpoenas resulted in 1,834 pages of
 7 documents produced, which Plaintiffs' counsel also reviewed.

8 5. With expert assistance, Plaintiffs' counsel analyzed vast amounts of computerized
 9 employee compensation and recruiting data, including approximately 80,000 files of
 10 employment-related data exceeding 50 gigabytes. Plaintiffs' counsel retained four experts and
 11 numerous consultants to review and analyze this data, documents produced in the action,
 12 deposition testimony, and other relevant facts; apply their relevant expertise to those facts; and
 13 form opinions regarding a range of assigned tasks. Those experts included Dr. Edward Leamer of
 14 the University of California, Los Angeles, who provided six expert reports consisting of 433
 15 pages of analysis. Defendants took four depositions of Dr. Leamer regarding his opinions.
 16 Plaintiffs retained Dr. Kevin Hallock of Cornell University, who provided two expert reports
 17 consisting of 232 pages of analysis. Defendants took two depositions of Dr. Hallock. Plaintiffs
 18 also retained Dr. Alan Manning of the London School of Economics, who provided one expert
 19 report, and Dr. Matthew Marx of the Sloan School of Management at the Massachusetts Institute
 20 of Technology, who provided two expert reports. Defendants also deposed Dr. Manning and Dr.
 21 Marx.

22 6. Plaintiffs' counsel and their experts also reviewed, deposed, and analyzed the
 23 expert analysis Defendants submitted. Defendants retained seven experts, who collectively
 24 submitted a total of 1,733 pages of expert reports, including detailed and extensive quantitative
 25 analysis. Plaintiffs' experts assessed these reports and provided responses to them. Plaintiffs'
 26 counsel took depositions of every defense expert, including multiple depositions for some
 27 witnesses.

28

1 7. Fact and expert discovery, which is now complete, has been thorough, and it
 2 required the parties to engage in numerous and extensive meetings and conferences concerning
 3 the scope of discovery and the analysis regarding the various electronic data, policy documents,
 4 and other files produced.

5 8. In addition to the discovery and class certification efforts described above, as the
 6 case neared trial the parties engaged in substantial motion practice and preparations for trial.
 7 Plaintiffs and Defendants litigated intensively motions for summary judgment, motions to
 8 exclude expert evidence and motions *in limine*, along with Plaintiffs' motion for the application
 9 of the *per se* standard and their motion to compel the production of a confidential document.
 10 Plaintiffs and Defendants also engaged in the exchange of extensive pretrial disclosures and
 11 conferences regarding trial exhibits, witnesses, the joint pretrial statement, and many other issues.
 12 With respect to hundreds of items of documentary evidence, the parties hotly disputed the
 13 application of the business records exception to the hearsay rule.

14 9. Plaintiffs' counsel also prepared extensively for trial by retaining a highly-
 15 experienced jury consultant to assist with jury preparation and selection.

16 10. Plaintiffs and the Settling Defendants engaged in extensive mediated negotiations
 17 to resolve the dispute. Initially, mediation was conducted by David Rotman. After a number of
 18 sessions, those efforts were unsuccessful. Subsequently, the parties retained the services of
 19 experienced mediator Hon. Layn Phillips (retired). Plaintiffs and Settling Defendants conducted
 20 a day-long mediation supervised by Judge Phillips on February 17, 2014. After two months of
 21 negotiations, Plaintiffs executed a Memorandum of Understanding with all Settling Defendants
 22 on April 24, 2014. Afterward, Plaintiffs and the Settling Defendants exchanged several drafts of
 23 the final Settlement Agreement and related settlement documents before the parties came to final
 24 agreement as to each.

25 11. On May 22, 2014, Plaintiffs Mark Fichtner, Siddharth Hariharan, and Daniel
 26 Stover moved the Court to preliminarily approve a settlement agreement with Defendants
 27 providing for a settlement fund of \$324,500,000. The Court denied preliminary approval on
 28 August 8, 2014 (Dkt. 974). Thereafter, the parties resumed arm's-length negotiations through

1 mediator Hon. Layn Phillips (Ret.), while continuing to litigate outstanding pre-trial matters.
 2 Plaintiffs filed a reply in support of their motion for application of the *per se* standard (Dkt. 988),
 3 and Defendants requested leave to file a supplemental opposition (Dkt. 990). Plaintiffs also filed
 4 a motion to unseal all papers associated with their motion to compel (Dkt. 991), which
 5 Defendants opposed (Dkt. 994). Meanwhile, on September 4, 2014, Defendants filed a Petition
 6 for a Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit, seeking an
 7 order vacating the Court's denial of preliminary approval and directing the Court to preliminarily
 8 approve the \$324,500,000 settlement. (9th Cir. Case No. 14-72745, Dkt. 1.) On September 22,
 9 2014, the Ninth Circuit issued an order stating that Defendants' "petition for a writ of mandamus
 10 raises issues that warrant a response," ordered Plaintiffs to file a response, set a date for
 11 Defendants' reply, and ordered that upon completion of briefing the matter shall be placed on the
 12 next available merits panel for oral argument. (9th Cir. Dkt. 2; Dkt. 993.) Plaintiffs (and Michael
 13 Devine separately) opposed Defendants' petition (9th Cir. Dkts. 4 & 6), and Defendants replied
 14 (9th Cir. Dkt. 10). Putative amici curiae Chamber of Commerce of the United States of America,
 15 California Chamber of Commerce, and economic scholars filed motions for leave to file amici
 16 curiae briefs in support of the petition (9th Cir. Dkts. 8 & 9), which the Ninth Circuit referred to
 17 the panel to be assigned to hear the merits of the petition (9th Cir. Dkt. 15). Plaintiffs (and
 18 Michael Devine separately) opposed the motions for leave to file amici curiae briefs. (9th Cir.
 19 Dkts. 13 & 16.) The Ninth Circuit scheduled oral argument on the petition for March 13, 2015.
 20 (9th Cir. Dkt. 19.)

21 12. In addition, Plaintiffs and Defendants have continued to engage in the exchange of
 22 extensive pretrial disclosures and conferences regarding trial exhibits, witnesses, the joint pretrial
 23 statement, the authentication of business records and potential depositions related thereto, and
 24 many other issues.

25 13. Throughout, Judge Phillips continued to facilitate negotiations between Plaintiffs,
 26 including Plaintiff Michael Devine, and Settling Defendants, all of whom reached a new
 27 agreement on January 7, 2015. Plaintiffs and the Settling Defendants exchanged several drafts of
 28

1 the final Settlement Agreement and related settlement documents before the parties came to final
2 agreement as to each.

3 14. At the time of settlement, the following motions remained pending: Defendants'
4 motion to exclude Dr. Marx's testimony; Plaintiffs' motion to exclude Defendants' experts'
5 testimony; Plaintiffs' motion for application of the *per se* standard; Defendants' motions *in*
6 *limine*; and Plaintiffs' motion to compel.

7 15. At all times during the negotiation process, counsel for Plaintiffs and the Settling
8 Defendants bargained vigorously and at arm's length on behalf of their clients. There was no
9 discussion of attorneys' fees prior to negotiating the class relief. There are no commitments
10 between the parties beyond what is set forth in the settlement agreement. At all times during the
11 negotiation process, Class Counsel and the Settling Defendants bargained vigorously on behalf of
12 their clients.

13 16. At this advanced stage of litigation, Plaintiffs have a keen understanding of the
14 factual and legal issues involved in this case as well as the relative strengths and weaknesses of
15 Plaintiffs' claims. Plaintiffs are well aware of the risks posed to each side by proceeding to trial
16 in this litigation.

17 17. Here, Class Counsel believe this Settlement is in the best interests of the Class and
18 is fully informed by Class Counsel's analysis of the evidence, case law, and risks at trial. The
19 proposed monetary recovery would be among the largest recoveries for employees in any class
20 litigation in history.

The Named Plaintiffs Have Expended Substantial Time and Effort in Assisting Class Counsel with the Prosecution of the Class's Claims

23 18. The Named Plaintiffs expended substantial time and effort assisting Class Counsel
24 with the prosecution of the Class's claims. They have responded to extensive document requests,
25 including requests regarding their lifetime employment history well beyond their experience with
26 Defendants here and without regard to time period (and across all variety of physical and
27 electronic locations), and worked with Class Counsel regarding difficult issues with third party
28 electronic databases. The Named Plaintiffs produced over 31,000 pages of documents to

1 Defendants, answered Defendants' interrogatories, and gave full-day depositions. They have also
 2 attended hearings and the mediation. The Named Plaintiffs have all devoted many hours
 3 consulting with Class counsel regarding fact development and strategy.

4 **Incurred Litigation Costs**

5 19. Based on the records of LCHB and reports provided to LCHB by the other firms
 6 representing Plaintiffs and the Class, to date the incurred and unreimbursed costs total
 7 approximately \$1,200,000. Each firm will provide more detailed cost information in connection
 8 with Plaintiffs' request for final approval.

9 **Attachments**

10 20. Attached as Exhibit 1 is a true and correct copy of the Settlement Agreement
 11 reached with Adobe Systems Incorporated, Apple Inc., Google Inc., and Intel Corporation.

12 21. Attached as Exhibit 2 is a true and correct copy of the October 8, 2004 Order
 13 issued in *Beck, et al. v. Boeing Co.*, Case No. 00-CV-0301-MJP, Dkt. 1067 at 4 (W.D. Wash.)
 14 (awarding \$100,000 service payments to each of the named plaintiffs).

15 22. Attached as Exhibit 3 is a true and correct copy of the order issued in *Ivax Corp. v. Aztec Peroxides, LLC, et al.*, Case No. 1:02CV00593 (D.D.C. Aug. 24, 2005) (awarding
 16 service payments to each class representative of \$100,000 each).

17 23. Attached as Exhibit 4 is a true and correct copy of the completed special verdict
 18 form issued in *Apple iPod iTunes Antitrust Litig.*, Case No. 05-cv- 0037 (YGR)

19 24. Attached as Exhibit 5 is a true and correct copy of the completed special verdict
 20 form issued in *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, Case No. MD 07-1827-SI (N.D.
 21 Cal.).

22 25. Attached as Exhibit 6 is a true and correct copy of the completed special verdict
 23 form issued in *Best Buy Co., Inc. v. AU Optronics Corp., et al.*, Case No. 10-CV-4572-SI (N.D.
 24 Cal.) and *Best Buy Co., Inc. v. Toshiba Corp., et al.*, Case No. 12-CV-4114-SI (N.D. Cal.)

25 26. Attached as Exhibit 7 is a true and correct copy of the completed special verdict
 26 form issued in *In re Tableware Antitrust Litig.*, Case No. C-04-3514-VRW (N.D. Cal.).

1 I declare under penalty of perjury under the laws of the United States and the State of
2 California that the foregoing is true and correct to the best of my knowledge and that this
3 declaration was executed in San Francisco, California on January 15, 2015.

4
5 */s/ Kelly M. Dermody*
6 Kelly M. Dermody
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28